[illegible]

[illegible] Citizens for an Independent Press, *et al.*,
Petitioners,

v.

Dick Thornburgh,
[illegible] General of the United States, *et al.*,
Respondents.

[illegible] TO THE
[illegible] APPEALS
[illegible] CIRCUIT

[illegible]
[illegible] ORATED

[illegible]

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QUESTION PRESENTED

Whether it was arbitrary or capricious for the Attorney General to determine that the Detroit Free Press was in probable danger of financial failure, and that preservation of its news and editorial voice through a joint operating arrangement would effectuate the policy and purpose of the Newspaper Preservation Act, where the record evidence showed that the Detroit Free Press:

- had sustained increasing operating losses totalling $83 million between 1979 and 1986;
- would have failed long ago without cash infusions of $176 million from its corporate parent;
- struggled unsuccessfully for more than a decade to overcome the commercial dominance of its rival, The Detroit News;
- trailed The Detroit News significantly in advertising, circulation, and revenue;
- could pursue no unilateral business strategy that would return it to profitability;
- had engaged at all times in proper marketing and managerial practices; and
- would go out of business if a joint operating arrangement with The Detroit News were denied.

STATEMENT PURSUANT TO RULE 28.1

Detroit Free Press, Incorporated is a wholly-owned subsidiary of Knight-Ridder, Inc. It has no subsidiaries other than wholly-owned subsidiaries. Its affiliates (excluding wholly-owned subsidiaries of Knight-Ridder, Inc.) are the following: the Seattle Times Company; Southeast Paper Manufacturing Company; Ponderay Newsprint Company; TKR Cable Company; SCI Holdings, Inc.; SCI Cable Partners; Knight-Ridder Tribune News Services; Fort Wayne Newspapers, Inc.; and Fort Wayne Newspaper Agency.

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JURISDICTION

The judgment of the court of appeals was entered on January 27, 1989, and its order denying rehearing was entered on February 24, 1989 (Pet. App. 164a-165a, 198a-199a). The petition for a writ of certiorari was filed on April 5, 1989, and was granted on May 1, 1989. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

A. Introduction.

For more than a decade, the Detroit Free Press ("Free Press") and its competitor, The Detroit News ("News"), have been locked in a contest for economic survival in the local newspaper market. It is a contest that the Free Press has lost. Financially, the Free Press is a shell, and would have ceased publication years ago absent massive and continuing cash infusions from Knight-Ridder, Inc. ("Knight-Ridder"), its corporate parent. For years it has not earned enough money to cover its operating expenses. Its losses between 1979 and 1986, when the record in this case closed, totaled $83 million. In the same period, Knight-Ridder, which sought to maintain the Free Press' presence in the community it has served for 158 years, has provided cash subsidies amounting to $176 million.

Despite management changes, large investments in plant and equipment, and expensive campaigns to reduce the News' leadership in circulation and advertising, nothing has helped to stem the losses or improve the economic viability of the Free Press. And nothing more can now be done to turn around the newspaper's fortunes. It is undisputed that the Free Press, with prices already higher than those of the News, cannot simply raise its prices further. The resulting loss of readership and advertising would be catastrophic. It is similarly undisputed that the Free Press has available no unilateral business strategy that has any prospect of saving the newspaper. All that might save the Free Press is a decision by the News to abandon its long-standing strategy of maintaining and strengthening its dominant market position by charging low prices, thereby permitting the Free Press to raise its prices as well. Understandably, the News, on the verge of total competitive victory and determined to assure its own survival, has stated unequivocally that it will not change its low-price policy.

On this record, the Attorney General exercised his discretion under the Newspaper Preservation Act ("NPA") and approved a joint operating arrangement ("JOA") with the News that would ensure the survival of the Free Press. Petitioners, who did not participate in the administrative hearings in this case and who introduced no evidence, disagree with the Attorney General that the News will not raise prices, disagree that the Free Press will close if the joint operating arrangement is not approved, and disagree that the same economic forces that necessitated passage of the NPA operate in the Detroit market and confront the Detroit community with the loss of an independent editorial and reportorial voice. They ask this Court to make the implausible assumption that the Free Press and the News will simply abandon the pricing policies imposed on them by the forces of competition, and that both papers will raise their prices without the benefit of a JOA.

Petitioners' challenge lacks merit. The determination of the Attorney General, which rests on inferences regarding the probable course of future events in the Detroit newspaper market, is amply supported by record evidence. Those inferences and predictions, affirmed as reasonable by two lower courts, bring this case squarely within the language and intent of the Newspaper Preservation Act.

B. Competition In The Newspaper Industry.

The legislative history of the Newspaper Preservation Act, 15 U.S.C. 1801-1804, and the record compiled in this case, shed a clear light on competitive conditions in the newspaper industry. It is an industry marked by uniquely intensive competitive forces that imperil the survival of second or junior newspapers in almost every metropolitan market.

Between 1920 and 1968, the number of American cities supporting two daily newspapers declined from 552 to 45. 115 Cong. Rec. 15661 (1969) (Sen. Inouye). This precipitous reduction affected cities in all parts of the country, ranging from small towns to the largest metropolitan markets. By 1950, only 51 of the top 100 newspaper markets had more than one commercially-competitive newspaper, and that number rapidly declined in the years following. JA 537-540, 560-564; NX 702 A-F.[1] Since 1970, established junior newspapers in Washington, D.C. (the *Star*), Philadelphia (the *Bulletin*), Cleveland (the *Press*), Baltimore (the *News-American*), Buffalo (the *Courier-Express*), Newark (the *News*), Portland (the *Oregon Journal*), and Hartford (the *Times*) all have shut down. This trend has left only 15 cities in the top 100 markets with more

1. In this brief, "Tr. ___" refers to the transcript of the cross-examination and redirect before the administrative law judge; "NX ___" refers to exhibits introduced by the JOA applicants; "AX ___" refers to exhibits introduced by the Antitrust Division; and "IX ___" refers to exhibits introduced by the intervenors.

than one independent metropolitan daily newspaper. *Ibid.* Moreover, the health of the few junior papers that still survive is precarious. Of the nine remaining junior newspapers in the top 30 markets, seven show losses and only those in Chicago and Boston show even marginal profits. JA 539-540, 555-556; App., *infra*, at A-4 to A-5.

Congress was acutely concerned by this "startling trend away from multiple-newspaper cities" (116 Cong. Rec. 1788 (1970) (Sen. Fong)) and investigated the problem in depth in 1969 and 1970. In the course of that investigation, members of Congress hailed the maintenance of diverse editorial viewpoints as an overriding national priority. "These varying voices," declared Senator Inouye, "weave the basic fabric of our democratic system." 115 Cong. Rec. 6232 (1969). In the words of Senator Bennett, loss of multiple editorial voices would be "tragic," since the nation's "concept of freedom and our system of government" depends on "choice" between competing views. 116 Cong. Rec. 1786 (1970). See also *id.* at 1795 (Sen. Goldwater) (the "widest possible dissemination of information from diverse and antagonistic sources, is essential to the public welfare"); *id.* at 23146 (Rep. Kastenmeier) ("Newspapers play a special role in maintaining a democracy and diversity of opinion in this Republic"); *id.* at 23153 (Rep. Matsunaga) ("maintaining divergent newspaper editorial voices in our country's great cities" is plainly in the national interest); *id.* at 23154 (Rep. Railsback) (the trend toward editorial monopoly has "dangerous significance" and is "destructive of the freedom upon which the vitality of this Nation is based"); *id.* at 23165 (Rep. Udall) (further movement toward one-newspaper cities would be a "disaster for the country").

Congress found that the widespread failure of second newspapers results from the unique dynamics of newspaper competition. The economics of the newspaper industry "make it more likely for newspapers to fail when faced with

competition than other businesses." S. Rep. No. 91-535, 91st Cong., 1st Sess. 4 (1969) (hereinafter, "Senate Report"). One of the special economic forces that Congress found responsible for the decline in newspaper competition was the mutual interdependence of advertising and circulation. See 116 Cong. Rec. 23166 (1970); 115 Cong. Rec. 15662 (1969); 116 Cong. Rec. 1788, 23171 (1970). Strong circulation increases advertiser patronage; conversely, a large quantity of advertising increases circulation. A newspaper with greater advertising and circulation than its rival therefore has a significant advantage as it seeks to increase its competitive lead. JA 548-549.

By the same token, weaknesses in circulation and advertising feed off each other. Readers who buy newspapers for advertising information, and businesses that advertise to reach the most readers, soon abandon a weaker paper for a stronger one. JA 586-587, 215, 324-326. A junior paper in a two-paper market can thus find itself in a competitive straitjacket, with the owner required to subsidize mounting losses in an effort to maintain all-important circulation and advertising shares. JA 220-221. If the owner cannot afford to subsidize circulation and advertising, the junior paper's losses will precipitate a mutually-reinforcing decline of circulation and advertising from which there is no escape. JA 214-215. Faced with such a failure, a newspaper owner must choose among three "bleak alternatives": shut down; sell out to its competitor; or attempt to subsidize escalating losses for an indefinite period with the hope of somehow regaining the patronage of readers and advertisers. See 116 Cong. Rec. 23153 (1970) (Rep. Matsunaga); *id.* at 1999 (Sen. Fong).

The fear of slipping into a second-place position that ultimately will lead to failure spurs intensive price competition. JA 213-215, 220. A newspaper that raises its prices (or refuses to meet its competitor's price reductions) risks a decisive loss of market share. Avoidance of this risk may

require operation at a loss or marginal profit. In view of these economic realities, newspapers in many cities, including Detroit, have had no choice but to pursue a strategy of seeking competitive leadership or a first-place position—referred to as market "dominance." As the CEO of Gannett Co., the current owner of the News, testified in this proceeding: "[T]he economic facts of life in the newspaper business have been for the past 40 years [that] the dominant newspaper, if it maintains its dominance long enough or enhances it, * * * ultimately thrives; the weaker paper ultimately dies." JA 220. "[I]n every instance—every instance—the weaker newspaper has either died or been saved by a JOA or is presently in danger of dying. There are no exceptions in this country." JA at 221.

Congress was aware that the unique dynamics of the newspaper industry compel papers to compete vigorously for circulation and advertising share in order to survive, sometimes at the cost of subsidizing unprofitable operations. Senator Fong, quoting the publisher of the *Honolulu Advertiser*, recognized that "massive and continuing infusions of capital" may be necessary to forestall a junior paper's demise. 116 Cong. Rec. 1788 (1970). Representative Matsunaga similarly observed that publishers faced with intensive competition have been forced to "subsidize[] their newspapers" to avoid closure. *Id.* at 23152-23153 (1970). History teaches that a dominant paper that aggressively defends its lead can ordinarily outlast its rival. In Washington, D.C., for example, the *Star* failed despite large infusions from its parent, Time, Inc. Similar infusions of cash could not save the *Cleveland Press*, the *Philadelphia Bulletin*, or the *Buffalo Courier-Express*. JA 559; Tr. 2364. Likewise, last-minute sales to new owners rarely remedy the economic predicament of a second-position paper, as demonstrated in recent years in Philadelphia, Cleveland, and Washington, D.C. Tr. 2210, 2353.

C. Enactment Of The Newspaper Preservation Act.

The event that triggered remedial legislation by Congress in the newspaper industry was an antitrust action filed by the United States to declare unlawful a 20-year-old JOA. The JOA merged the business operations of two newspapers in Tucson, Arizona, while leaving their news and editorial operations separate and independent. The papers contended that the JOA was economically necessary to save the junior paper over the long term even though the junior paper did not yet face a "grave probability of a business failure," as required under the traditional "failing company" doctrine of *International Shoe Co.* v. *FTC*, 280 U.S. 291, 302 (1930).

This Court held, however, that the "failing company" doctrine applied with unmodified strictness to failing newspapers. *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969). Applying that standard to invalidate the JOA, the Court stated that "[t]here is no indication that the owners of the Citizen were contemplating a liquidation. They never sought to sell the Citizen and there is no evidence that the joint operating agreement was the last straw at which the Citizen grasped." *Id.* at 137. Because a dominant newspaper would gain no benefit from negotiating a JOA with a competitor on the brink of failure, the practical effect of *Citizen Publishing* was not only to put at risk the 21 JOAs then in existence in other cities, but also to remove the JOA as a viable alternative for the future.

Congress promptly responded to *Citizen Publishing* by passing the Newspaper Preservation Act in 1970. It did so over the opposition of the Antitrust Division of the Department of Justice. Richard McLaren, then head of the Division, took the position that "if a business concern, including a newspaper, can only be saved by eliminating all meaningful competition between it and its competitors, it would be better to let it disappear." *The Newspaper Preservation*

Act: Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Sen. Judiciary Comm., 91st Cong., 1st Sess. 295 (1969). Congress disagreed with that policy judgment and passed the Act by margins of 5 to 1 in the Senate and 3 to 1 in the House. 116 Cong. Rec. 2017, 23179 (1970). The purpose of the Newspaper Preservation Act was to overrule *Citizen Publishing* as to both existing and prospective JOAs, and thereby serve "the public interest [in] maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." 15 U.S.C. 1801. See Senate Report at 4 ("The Committee wishes to establish a less stringent test than that applied in the case of *Citizen Publishing Company* v. *U.S.*").

For JOAs in existence in 1970, the Act established the requirement that, at the time the JOA was implemented, not more than one of the newspapers was "likely to remain or become a financially sound publication." 15 U.S.C. 1803(a). The Act left all pre-1970 JOAs in place, subject only to possible court challenge. The Act's standard for pre-1970 JOAs has been met by every JOA that has been tested. See *City of Honolulu* v. *Hawaii Newspaper Agency*, 559 F. Supp. 1021 (D. Hawaii 1983); *Pacific Sun Publishing Co.* v. *Chronicle Publishing Co.*, Civ. No. 75-1845 RPA (N.D. Cal. June 15, 1981).

Congress also established procedures and standards for future JOAs. In contrast to pre-1970 JOAs, however, the decision whether to approve post-1970 JOAs was committed to the discretion of the Attorney General. The Attorney General has sole responsibility under the statute to approve a JOA if he finds that two broadly-worded conditions are met: (1) that at least one of the two newspaper applicants is a "failing newspaper"—defined as a newspaper "which, regardless of its ownership or affiliations, is in probable danger of financial failure"—and (2) that approval of the JOA "would effectuate the policy and purpose" of the Act.

15 U.S.C. 1802(5), 1803(b). The statute has no provision for judicial review; suits challenging decisions by the Attorney General must proceed under the "arbitrary or capricious" standard of the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

D. History Of The Detroit Newspaper War.

1. *The Competitive Battle: Dominance Equals Survival.* The "Great Detroit Newspaper War" between the Free Press and the News "traces back into dim history." Pet. App. 15a. Its modern phase began in 1960, when the News bought the assets of *The Detroit Times* and gained a substantial circulation lead over the Free Press. *Ibid.* The battle has been fought with increasing vigor ever since (*id.* at 15a-31a), motivated by the belief of each newspaper that it could not survive if it failed to secure for itself the dominant position in the market. A typical long-range planning document, prepared by the Free Press in 1981, declared that "[t]he Free Press, over the coming months and years, must position itself to be the dominant [and] surviving metropolitan newspaper." JA 604; see also *id.* at 605-608; NX 852 B.

The Free Press' perception of Detroit's inability to support two newspapers under competitive conditions hardened considerably from 1979 to 1984, when the Detroit economy suffered its most significant period of economic decline since the Great Depression. See Pet App. 14a. Significant declines in population, personal income, and retail sales hit the Free Press and the News severely. JA 277-278. In 1982, the President of the Free Press explained to Knight-Ridder: "I do not see how two newspapers in this market will ever show a profit." AX 508 C; see also NX 852 B, J; IX 42 A-C. The management of the News similarly concluded that the junior newspaper in Detroit would not survive. By 1982, neither Peter Clark, the President and Chairman of Evening News Association ("ENA"), which owned the

News, nor the ENA board of directors "envisioned any scenario where commercial competition could continue between the News and the Free Press long term." JA 510. That being the case, Mr. Clark concluded that in Detroit "dominance equals survival" and that there is "no safe niche for a second newspaper." JA 207-208, 504-505.

This view was shared by Allen Neuharth, the CEO of Gannett, which purchased the News in 1986. According to Mr. Neuharth, "[w]hen we began negotiations and for many years previously, I believe[d] that absent a JOA, Detroit would become a one newspaper town." JA 225, 480-481. Alvah H. Chapman, Jr., his counterpart at Knight-Ridder, was of the same view: "[T]here will only be one survivor in the newspaper business in Detroit. I've come to believe that for a number of years." JA 243. Thus, according to Free Press publisher David Lawrence, "it was a perilous and perhaps fatal position ultimately to be No. 2." JA 325.

After entering its fourth consecutive year of accelerating losses, Knight-Ridder in 1982 recognized the possibility that it might be driven to "shut down" the Free Press. AX 514 C; IX 42 B, C. It was aware that three other junior papers, the *Cleveland Press*, the *Philadelphia Bulletin*, and the *Buffalo Courier-Express*, had only recently been forced to close their doors. JA 559, 560-561, 405. Knight-Ridder reported that the Free Press constituted "the single most critical drain on the company's profits" and that "[t]he company cannot be expected to tolerate indefinitely, with no end in sight, the damage that this drain does to the company's overall strength." IX 99. Knight-Ridder ultimately decided, however, to continue its quest for market leadership because it believed (erroneously as events proved) that the News' losses were greater than those of the Free Press, and that the News might be forced ultimately to relax the defense of its dominant market position. JA 405-406.

Already the higher-priced paper, and unable to raise its prices and risk further loss of market share, the Free Press, with Knight-Ridder's backing, undertook in 1984 an ambitious (and expensive) program to break the stalemate. That program, called Operation Tiger, represented "a strategy for complete product dominance so that there is no category important to us or to our readers in which this newspaper is exceeded by its competitor." IX 99 C-D. Operation Tiger sought to improve the quality of the paper so much that prices could be raised without catastrophic readership loss. JA 329; IX 96 D; Tr. 2879-2880. It was an effort, in other words, to break the stranglehold of newspaper economics and achieve profitability through higher prices, irrespective of the News' determination to sell its paper at a low price to maintain high circulation. JA 348, 358-359, 512. To pursue Operation Tiger, the Knight-Ridder board authorized a capital expenditure of $22.4 million to buy additional printing presses and expand the Free Press' Riverfront plant to accommodate them. JA 412.

Operation Tiger called for an increase in the price of the Sunday paper from $.50 to $.75, which the Free Press implemented in January 1985. IX 99 Z-33; JA 426. The News declined to match the price increase for three months, with devastating consequences for the Free Press: an 8% loss of Sunday circulation (70,000 issues) for the Free Press compared to a 2% gain by the News. JA 467, 202-203; NX 1 I, J. The Free Press' Sunday circulation has continued to fall in absolute amount and in market share relative to the News. JA 426-427, 622. Mr. Chapman testified that "I have not ever in my whole career experienced a price increase affecting circulation in such a negative fashion as has this one." JA 261, 328-329. By the same token, both Mr. Clark and his colleagues came to see that the News' belated decision to match the Free Press' Sunday increase was a serious mistake because it sacrificed an opportunity to

achieve further circulation gains. JA 519; Tr. 1396, 3403-3405.[2]

In short, Operation Tiger, a do-or-die effort by the Free Press to gain control of its own destiny, proved to be a costly failure. JA 218, 444. Total cash infusions of $176 million from Knight-Ridder to the Free Press could not remedy the paper's untenable economic position. JA 265, 413-414.

2. *Knight-Ridder's Efforts To Obtain A JOA.* By 1981, the Free Press had entered its third year of increasing multi-million dollar losses. Pet. App. 76a-77a. As Detroit plunged deeper into recession, and with management already persuaded that two competitive papers could not survive in the city, the Free Press approached the dominant News to inquire about a possible JOA. The News' owners were polite, but firm: they had no interest. JA 406. ENA's chairman explained that "his company ha[d] traditionally been independent" and "[a]nything which interfered with traditional independence * * * would be difficult to achieve." JA 600. Discussions concerning a possible JOA continued sporadically, but never seriously so far as the News was concerned. Pet. App. 20a-21a. Despite Knight-Ridder's hope that the News' owners might ultimately change their mind, the answer always remained the same, and the Great Detroit Newspaper War continued unabated. ENA sold the News to Gannett in 1985, never having agreed to a JOA.

At the time Gannett bought the News, the enormous expenditures associated with Operation Tiger had accomplished no more for the Free Press than maintenance of the status quo. Between 1982 and 1985, some circulation measures showed incremental gains by the Free Press (Pet. App. 46a-53a), but overall losses increased. App., *infra*, at A-1.

2. Despite the prospect of deep losses for each year since 1981, the News has resisted any advertising price increases. Tr. 1394-1395, 3373; JA 343-344; IX 274 B-C. The News' policy has been a key deterrent to any substantial advertising gains by the Free Press. Pet. App. 58a n.121.

Faced with the prospect of continuing financial losses for the News so long as Knight-Ridder was willing to subsidize the Free Press (Pet. App. 82a-85a), and uncertain about how long those subsidies would be continued (JA 259), Gannett expressed interest in discussing a JOA. Gannett's CEO explained that Gannett was in a "win, win" situation: either the News would maintain its intensely competitive pricing policies and outlast the Free Press, or it would enter into a JOA on favorable terms. JA 225-229; Pet. App. 116a.

The papers announced the JOA in April 1986. Under the JOA, commercial operations of the two newspapers will be combined but their respective news and editorial functions will remain separate and independent. The News is initially to receive 55% of the profits of the JOA, with profits to be split equally after five years. Crucial to Gannett was that it control the financial management of the two newspapers, and this right was obtained through the JOA. JA 522-523; Pet. App. 116a, 20a.

In the seven years preceding execution of the JOA, the Free Press had lost $83 million, and its losses were accelerating. App., *infra*, at A-1. The newspaper had been kept alive only by cash infusions from Knight-Ridder totaling $176 million. *Id.* at A-2. Despite these massive subsidies, and despite the narrowness of the News' persistent lead in total daily circulation (Pet. App. 41a), the News continued to enjoy clear superiority over the Free Press in areas of greatest economic importance. It had a clear lead in daily circulation, and almost 60% of Sunday circulation, in Detroit's Primary Market Area, which generates the largest amount of advertising and circulation revenues. Pet. App. 44a, 46a-49a; see also JA 454. The News also enjoyed a decisive 61% to 39% lead over the Free Press in advertising revenues, "by far the most important source of revenues for both newspapers." Pet. App. 58a, 61a; App., *infra*, at A-3. The News had total revenues of $230 million in 1986, $61 million (or 36%) more than the Free Press had available to

continue the competitive struggle. Pet. App. 76a-77a, 84a-85a; App., *infra*, at A-3.

Under these circumstances, the Free Press saw the JOA as the only way to remain in business and to save most of the 2,100 jobs that would be lost if the newspaper closed. See Free Press opposition to stay request in this Court, Ex. G, p. 4.

E. Proceedings Before The Attorney General.

In May 1986, the Free Press and the News applied to the Attorney General for approval of their JOA. Exercising his discretion under Justice Department regulations, the Attorney General referred the application to Morton Needelman, a retired FTC administrative law judge, for preliminary fact finding and a "recommendation" as to disposition. See 28 C.F.R. 48.8(c), 48.10(d). Both papers participated in the administrative hearings, as did the Antitrust Division. Six labor unions (representing more than 85% of Free Press employees) intervened in the proceeding; all of them ultimately supported approval of the JOA after concluding that without a JOA the Free Press would close. JA 126-129, 132-139. The Mayor of the City of Detroit also intervened, and, following the hearing, concluded that he did not oppose the JOA. JA 130-131.

After completion of the hearing, the ALJ summarized the facts and made extensive findings. The financial statements for the Free Press, included in the findings of the ALJ, showed total losses of over $83 million from 1979 through 1986. Pet. App. 76a-77a. Thus, as the ALJ found, "there can be no serious question that between 1979-1986 the Free Press had deep operating losses, that it did not generate an adequate cash flow to cover actual operating expenses, that given its poor financial performance it was unlikely to find funding elsewhere, and that without advances from Knight-Ridder (or some other parent) it could not continue as a going concern on a stand-alone basis." Pet. App. 81a-82a. He also found that, among other advantages, the News had

almost 60% of the Sunday circulation in the Detroit Primary Market Area, 61.1% of total advertising revenues, and total revenues of $230 million ($61 million more than the Free Press). Pet. App. 61a, 76a-77a, 84a-85a. The ALJ acknowledged that the Free Press could not solve its financial problems through cost-cutting: "the Detroit unions have simply not been willing to accept less than the wages and benefits offered by metropolitan papers in other areas, and accordingly there is no basis for speculating about the possibility of cost savings in this area without a JOA." Pet. App. 100a-102a, 121a.

The ALJ recognized that there was nothing that the Free Press could do by itself to avoid or alleviate these losses. The managements of both papers, the ALJ found, "believed that the goals of dominance and future profitability at the cost of near-term earnings were rational policies given the past history of many [junior] papers which had not been able to survive as the second paper in metropolitan area competition." Pet. App. 19a. In agreement with an Antitrust Division expert witness who saw "no independent action * * * that could return the Free Press to profitability" (*id.* at 100a), the ALJ found that "[s]ince neither the Free Press nor the News can raise circulation or advertising prices without regard to what the other paper does, there is no completely unilateral course of action which either paper can pursue which would return it to profitability." *Id.* at 122a. Any "attempt by the Free Press to increase unilaterally the price of advertising would result in still further erosion of its share of linage, which would give the News additional circulation." *Id.* at 93a. Nonetheless, on the basis of his speculation that in the absence of a JOA the News "may eventually" give up its long-standing fight for market dominance and raise its prices, thereby permitting the Free Press to follow suit and perhaps achieve profitability, the ALJ recommended denial of the application. Pet. App. 92a.

Following his review of the factual record compiled by the ALJ and the applicable law, the Attorney General approved the JOA. He agreed with a prior opinion of Attorney General William French Smith that "[i]t is apparent from the express language of the statute that 'failing newspaper' analysis under the Act must focus upon the financial condition of the particular publication at issue, and that 'danger of financial failure' must be assessed as a matter of probabilities, not certainties." JA 146 (citation omitted). He also agreed with and quoted the "commonsense" and admittedly narrow formulation of the standard articulated by the Ninth Circuit—"Is the newspaper suffering losses which more than likely cannot be reversed?" JA 146-147, citing *Committee For An Independent P-I* v. *Hearst Corp.*, 704 F.2d 467, 478 (9th Cir.), cert. denied, 464 U.S. 892 (1983). Undisputed facts cited by the Attorney General (and found by the ALJ), including "operating losses * * * aggregating over $81 million through 1986," made "failure" of the Free Press not merely probable but "highly 'probable.'" JA 146, 154.[3]

The Attorney General considered the possibility, given prominence by the ALJ, that despite management's detailed testimony to the contrary (JA 264-272, 283), the Free Press might continue to operate at a loss in the hope that the News would some day alter its competitive strategy and raise its prices. The Attorney General rejected that speculation as insufficiently likely to justify rejection of the JOA. The News "has made clear that it has no intention of embarking on such a course, either unilaterally or in conjunction with" the Free Press—a strategy that "hardly reflects unsound business judgment" in light of the News' competitive ability to outlast the Free Press. JA 148-149. Furthermore, the

3. The Attorney General's reference to an $81 million figure (JA 146) appears to be a minor typographical error. The chart cited in support of that figure (reproduced at Pet. App. 76a) correctly reflects a total loss for the Free Press of $83 million.

Attorney General recognized that the same market forces that make it unduly risky for the Free Press to initiate a price increase apply as well to the News, and thus that an unsupported supposition of price increases by the News would be unwarranted. JA 145; see also *id.* at 586. Accordingly, "it is unquestionably the case that the Free Press is locked into a loss situation involving millions of dollars each year for the foreseeable future, with no realistic prospect of extricating itself. Indeed, were it not for a major infusion of millions of dollars by its parent, there is every reason to assume that the Free Press would have failed long ago." JA 147-148 (citations omitted).

The second statutory determination made by the Attorney General was that approval of the JOA "would effectuate the policy and purpose" of the Act. 15 U.S.C. 1803(b). The congressional declaration of policy describes the legislation as serving "the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States," and "the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement * * * is hereafter effected" pursuant to the statute. 15 U.S.C. 1801.

The Attorney General determined that Congress' purpose to preserve endangered editorial voices would be effectuated by approving the JOA in this instance (JA 151):

> To stand by and watch the paper's demise would poorly serve the Act's policy disfavoring a newspaper monopoly in the City of Detroit. As the Administrative Law Judge found, this is not a situation where the Free Press has brought itself to the brink of financial failure through improper marketing practices or culpable mismanagement. Keen competition aimed at market domination and future profitability—competition waged energetically but both responsibly and properly—has moved both newspapers into intractable loss positions from

> which only one, the News, now appears to have any reasonable prospect of emerging. (Citations omitted).

The Attorney General also found that approval of the JOA was appropriate despite the fact that Knight-Ridder's subsidies had kept the Free Press from falling into a "downward spiral." He explained that "no less destructive of the dual objectives of preserving open competition and vigorous editorial debate [than a downward spiral] is the financial failure of one of two newspapers that has been locked for almost a decade in a severely competitive struggle for market domination and suffered irreversible operating losses year after year. If a JOA provides an acceptable means of avoiding the monopoly market anticipated in the former situation, so, too, does its approval serve to 'effectuate the policy and purpose' of the Act when confronted with the near certain newspaper monopoly that will result in the latter circumstance." JA 153.

Finally, the Attorney General considered but rejected as factually unsupported the assertion that "the prospect of a JOA" was "responsible most recently for the papers' reluctance to increase prices and eliminate discounting." He noted that the record "makes abundantly clear that the strategy followed by both papers has been in place for nearly a decade, and the heavy expenditure of investment capital by Knight-Ridder over that period of time belies the notion that it was principally pursuing any end other than market domination." JA 152 (citation omitted).

F. Affirmance By The District Court.

Less than 48 hours before the JOA was to become effective, Public Citizen Litigation Group, representing an organization of about 20 individuals, filed a complaint in the district court challenging the Attorney General's decision. JA 156-166. None of the plaintiffs had participated in the

hearings before the ALJ. A 30-day stay was entered to permit full briefing of the case. *Id.* at 189-190.

After briefing and oral argument, the district court upheld the Attorney General's decision, finding that it was neither arbitrary nor capricious. Pet. App. 160a-161a. Judge Revercomb found ample evidence to support the conclusion that the Free Press constituted a "failing newspaper," given the paper's huge losses, its inability to pursue any unilateral business strategy that could return it to profitability, and the fact that the paper would have ceased publication long ago had it not been for the "massive infusions of funds" from its corporate parent. Pet. App. 156a.

The district court expressly rejected petitioners' assertion that the Attorney General was required to presume that the News would raise prices if a JOA were denied. The court explained that "the Attorney General was not unreasonable in concluding that there is no reason to expect the News to raise its prices any time soon," considering that such a move would put at risk its circulation advantage, which in turn could jeopardize its position as the lead paper in Detroit, and considering that "the management of the News has stated that it has no intention of raising prices." Pet. App. 157a.

G. Affirmance By The Court Of Appeals.

The court of appeals affirmed. Judge Silberman, joined by Judge Robinson, explained that the Attorney General's construction of the Act, which followed the Ninth Circuit's decision in *Hearst,* was a reasonable statutory interpretation. Pet. App. 168a, 179a. The court also sustained as reasonable the Attorney General's application of the statute to the facts. *Id.* at 183a-189a.

Like the district court, the court of appeals found substantial evidence in the record for the Attorney General's predictions that in the absence of a JOA the News would not likely raise prices and that the Free Press would close. Pet.

App. 184a-186a. In addition, the court rejected as groundless petitioners' argument that the newspapers had pursued a price war in order to generate losses justifying a JOA, and thus were guilty of disqualifying management practices. "[T]he record of years of fierce competition and consequent losses to both papers led the Attorney General reasonably to conclude that both papers were principally pursuing market domination and that their strategies had been followed before any mutual discussion of a JOA." *Id.* at 189a.

Judge Ruth Ginsburg dissented, recommending that the case be remanded for further explanation. Pet. App. 191a. In a footnote, Judge Ginsburg questioned dicta in the majority opinion regarding the proper treatment of canons of statutory construction. *Id.* at 196a n.6. She acknowledged, however, that the Attorney General in fact adopted a narrow construction of the NPA through his application of the *Hearst* decision, which held "that antitrust exemptions must be narrowly construed." *Id.* at 195a-196a.

The D.C. Circuit declined to rehear the case *en banc*. No other judges adopted the views expressed in Judge Ginsburg's dissenting opinion. Instead, Chief Judge Wald, joined by Judges Mikva and Edwards (in an opinion that Judge Ginsburg did not join) questioned the Attorney General's prediction that the News was unlikely to raise prices in the event a JOA were denied. Pet. App. 205a-209a. She speculated that unlawful predatory conduct may have precipitated the Free Press' failure (an assertion without support in any submission of the Antitrust Division or any finding by the Attorney General) and that the News was unlikely to continue its low prices because "standard economic principles" make continued low prices improbable. *Id.* at 209a.

The panel majority responded to Chief Judge Wald's arguments in a concurrence to the Court's denial of rehearing *en banc*. They observed that Congress had passed the

NPA precisely because "standard economic principles" frequently do not apply in the newspaper industry, and that pricing policies like those of the News and the Free Press that are designed to prevent the potentially devastating and permanent loss of market share are entirely rational. Pet. App. 200a-203a. Judges Silberman and Robinson also noted that allegations of predatory pricing were "not raised by any party—including the antitrust division—before the ALJ or the Attorney General." *Id.* at 203a.

SUMMARY OF ARGUMENT

The Newspaper Preservation Act embodies Congress' determination that, in the newspaper industry, strict application of the "failing company" defense does not promote competition, and should not be permitted because it compromises the First Amendment goal of maintaining diversity in reportorial and editorial voices. Based on an extensive evidentiary record showing that the Free Press is a commercial failure in the Detroit market and would cease publication absent approval of a joint operating agreement with the News, the Attorney General found that the Free Press is a "failing newspaper" and that approval of the JOA would "effectuate the policy and purpose" of the Act. 15 U.S.C. 1803(b). This determination may not be set aside unless it is shown to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Petitioners have not come close to satisfying that heavy burden.

The arbitrary or capricious standard narrowly circumscribes judicial review of administrative action. A reviewing court may overturn a decision only if it finds that the administrative decision-maker committed a procedural error, misconstrued the law or made a "clear error of judgment." *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). This case does not remotely resemble those situations. Petitioners do not argue that the

Attorney General's decision-making process was flawed, that the Attorney General neglected to consider a relevant statutory factor, or that the Attorney General failed to explain the reasons for his decision or its evidentiary basis. Rather, petitioners simply quarrel with the Attorney General's factual findings concerning the propriety of the competition between the Free Press and the News, and his predictions about the future of the Detroit newspaper market. But these determinations, which have been upheld by the district court and the court of appeals, find overwhelming support in the administrative record.

The record compiled at the administrative hearing contained abundant evidence of the Free Press' financial distress. As a consequence of its decades-long competitive battle with the News, the Free Press lost $83 million from 1979 through 1986, and faced significant competitive disadvantages in circulation, advertising, and total revenues. Moreover, the evidence was undisputed that the Free Press could not take any unilateral action that would return the newspaper to profitability. Indeed, were it not for the massive infusion of $176 million by its corporate parent, the Free Press would have failed years ago.

The record also establishes that the Free Press will close unless the JOA is approved. The News has no reason to alleviate the Free Press' financial difficulties by raising its own prices. Especially now that the Free Press' dismal financial condition has been revealed, the News can simply sit back and wait for the Free Press to fail. Knight-Ridder has made clear its intent to close the newspaper in the event the JOA is not approved, a perfectly rational action in light of its mounting, uncontrollable, and otherwise endless losses.

It is not difficult to apply the statutory standard to this factual situation. The Attorney General properly concluded that the Free Press is a "failing newspaper," which the NPA defines as a newspaper that is in "probable danger

of financial failure." 15 U.S.C. 1803(b), 1802(5). In view of the Free Press' continued deficits, its competitive disadvantages under almost every index of economic measurement, and the absence of any unilateral means for the newspaper to return to profitability, the Free Press surely meets this standard.

The Attorney General's conclusion that approval of the JOA would "effectuate the policy and purpose of" the Act is also plainly correct. 15 U.S.C. 1803(b). The statutory policy of maintaining diverse editorial and reportorial voices will be furthered by approval of the JOA because that is the only course of action that will allow both newspapers to survive. The sole alternative is elimination of the Free Press and establishment of a complete economic and editorial newspaper monopoly in Detroit.

This is a clear case for application of the Newspaper Preservation Act. The junior newspaper in this two-newspaper market unquestionably is in severe financial distress, with no way to halt its accelerating losses other than ceasing operations. Congress determined that a JOA should be available in just such a situation in order to further the First Amendment goal of preserving multiple editorial voices for the communication of diverse viewpoints. The Attorney General's approval of the JOA should not be overturned by this Court.

ARGUMENT

THE ATTORNEY GENERAL'S APPROVAL OF THE JOINT OPERATING ARRANGEMENT SHOULD BE AFFIRMED BECAUSE IT CONSTITUTES A REASONABLE APPLICATION OF THE STATUTE TO THE FACTS OF THIS CASE.

Congress in the Newspaper Preservation Act expressly delegated to the Attorney General the authority to evaluate and rule upon applications for JOAs. The statute empowers the Attorney General to approve a joint operating

arrangement if he determines that a newspaper is a "failing newspaper" and that approval of the JOA "would effectuate the policy and purpose" of the Act. 15 U.S.C. 1803(b). The term "failing newspaper" is defined as a newspaper "which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. 1802(5). Congress left no doubt that its purpose was to serve "the public interest [in] maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." Congress also declared it to be the nation's "public policy * * * to preserve the publication of newspapers in any city, community, or metropolitan area" where a joint operating arrangement is approved under the standards of the Act. 15 U.S.C. 1801.

In approving the Detroit JOA in a comprehensive and carefully-reasoned opinion, the Attorney General made both of the determinations required by Congress: that the Free Press is a "failing newspaper" and that "the policy and purpose" of the NPA would be well served by preventing the newspaper's demise. His decision rested on findings of historical fact made by the administrative law judge, as well as predictions and inferences that reasonably flowed from those facts. Both lower courts concluded that the Attorney General's decision was well within the range of discretion conferred on him by Congress. Petitioners have offered no reason for this Court to overturn that collective judgment.

A. The Attorney General's Determinations Under The Act May Not Be Set Aside Unless They Are Shown To Be Arbitrary Or Capricious.

Judicial review of the Attorney General's decision under the NPA is governed by the familiar principles set forth in the Administrative Procedure Act. The administrative mechanism established by the NPA is indistinguishable from the numerous other situations in which Congress has

conferred upon an administrative decision-maker the discretion to implement on a case-by-case basis a policy decision embodied in the governing statute. Thus, the NPA not only empowers the Attorney General to make the determinations at issue here, but also speaks in generic and inclusive terms that call for the exercise of administrative judgment. The Act encompasses any newspaper that, viewed without reference to the assets of or assistance from its owner, is in "probable danger" of financial failure. The Act looks to probabilities, not certainties. The Act also calls on the Attorney General to safeguard the public interest in maintaining the independence and competitiveness of the "editorial[]" and "reportorial[]" voices of newspapers in "any city," "community" or "metropolitan area" (15 U.S.C. 1801), from small towns to "our country's great cities." 116 Cong. Rec. 23153 (Rep. Matsunaga).

On its face, this is not an enactment that stringently limits the circumstances in which the Attorney General may act to save a failing newspaper, as petitioners erroneously suggest. Br. 17-21. See *Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414, 420-421 (1988). Congress did not require the existence of particular enumerated adverse market conditions or insist that papers be on the verge of collapse, but focused instead on the probability of failure and the public policy of preserving diversity of editorial and reportorial points of view in any city threatened with newspaper closure.

Moreover, Congress' decision to entrust these determinations to the Attorney General was a considered one. As originally introduced, the bill that became the Newspaper Preservation Act would have authorized the federal courts to determine the lawfulness of prospective JOAs. *Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Sen. Judiciary Comm.*, 90th Cong., 1st Sess. 451 (1967). The bill was amended in committee to transfer all decision-making authority over post-1970 JOAs to the Attorney General, and the Senate defeated an effort to

return that authority to the courts. 116 Cong. Rec. 2004-2005 (1970).

An administrative decision rendered by the official designated by Congress is, of course, entitled to "a presumption of regularity." *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971). It may be overturned on judicial review only if it is shown to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). That standard of review "is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Overton Park*, 401 U.S. at 416. Absent proof that the administrative decision-maker either failed to consider the relevant factors or committed a "clear error of judgment," the administrative determination must be upheld. *Ibid.*; see also *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-286, 290 (1974).[4]

As we demonstrate below, the Attorney General's application of the generic language of the Newspaper Preservation Act to the facts of this particular record not only falls within the broad range of discretion that applies to such administrative action, but indeed is plainly correct on the merits. Under no sensible construction of the NPA could the Free Press be characterized as anything other than a

4. Petitioners conceded in the court of appeals that the Attorney General's determinations were subject to deferential review under the APA. See Pet. C.A. Br. 17-18. In this Court, however, petitioners make the remarkable argument that no deference is warranted. Br. 34-39. But nothing in the language or legislative history of the Newspaper Preservation Act suggests that Congress intended to override the otherwise applicable standard of review under the APA (see 5 U.S.C. 559). The evidence that petitioners offer—that "Congress expected the courts to construe the Act" (Pet. Br. 35)—does not speak to the standard of review. Furthermore, the case upon which petitioners rely, *United States* v. *First City National Bank*, 386 U.S. 361 (1967), is plainly irrelevant here because the statute before the Court in that case *did* contain a provision expressly providing for "review *de novo*" of the administrative decision. See *id.* at 365, 368; see also pp. 40-41, *infra*.

newspaper in "probable danger of financial failure." And it would clearly do violence to Congress' stated policy of preserving editorial and reportorial diversity to silence the voice of this newspaper merely because it has been forced to the wall by the rigors of a competitive struggle "waged energetically but both responsibly and properly." JA 151.

B. The Attorney General's Decision Is Consistent With The Language, Legislative History And Purpose Of The Newspaper Preservation Act.

1. The Attorney General's findings and predictions are amply supported by the record.

Although petitioners contend that the Attorney General's decision to approve the JOA is contrary to the Newspaper Preservation Act, their arguments depend almost entirely upon challenges to the Attorney General's factual findings and predictions about the Detroit newspaper market. Petitioners assert, for example, that the Free Press "was in a position to become the dominant newspaper in Detroit" (Br. 22), that "the Free Press was a healthy paper and had a number of competitive advantages over the News" (Br. 23), that "the newspapers were essentially competitive equals" (Br. 23), and that "the News [would not] maintain its low prices" if the JOA were denied (Br. 27 n.9).

The Attorney General, of course, made precisely the opposite determinations, as he was entirely free to do under the NPA. See *Bowman Transportation*, 419 U.S. at 288 n. 4, 292-293. Those findings were upheld by both the district court and the court of appeals. This Court frequently has stated that it will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). See also *NCAA* v. *Board of Regents*, 468 U.S. 85, 98 n.15 (1984). Petitioners have not come close to meeting that heavy burden here.

Indeed, this is a particularly inappropriate case for disturbing those fact findings, because the Attorney General's determinations rested principally on his assessment of future events. The NPA requires the Attorney General to make a specialized predictive judgment about what events are likely to occur in a particular newspaper market. Here, for example, the Attorney General had to determine whether the News was likely to maintain the low prices that led to its position of market leadership, and whether the Free Press would probably fail absent a JOA. In an area of predictive judgment such as this, a reviewing court has a particularly tenuous basis for second-guessing the evaluation of the responsible executive official. See *Bowman Transportation*, 419 U.S. at 292-293; *Baltimore Gas & Electric Co.* v. *NRDC*, 462 U.S. 87, 103 (1983) (a reviewing court must be "most deferential" when evaluating administrative "predictions," as opposed to "simple findings of fact"); *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (same).

The Attorney General, the district court, and the court of appeals all agree that the Free Press will probably fail unless a JOA is granted. This unanimity forecloses petitioners' transparent attempt to relitigate the facts in this Court. Beyond this, even if petitioners' claims could be considered afresh, they would have to be rejected, because the administrative record contains overwhelming support for the Attorney General's determination.

As the Attorney General explained, the evidence showed that the Free Press lost $83 million from 1979 through 1986, that the News enjoyed significant, long-standing competitive advantages in both advertising and circulation, that the Free Press' losses were not the result of any improper marketing practices or mismanagement, that the Free Press had "no realistic prospect of outlasting the News, given the latter's substantial advertising and persistent circulation lead," that the Free Press would have failed years earlier

were it not for $176 million in cash subsidies from Knight-Ridder, and that, "as all seem to acknowledge," there is nothing that the Free Press can do unilaterally to restore the paper to a profitable position. JA 146-148. Based on these findings, the Attorney General determined that "the Free Press has satisfactorily demonstrated that the danger of its financial failure has moved well within the zone of 'probability'"—and, in fact, is "highly 'probable.'" JA 151, 154.

By the same token, the Attorney General plainly was entitled to determine that, if a JOA were denied, the News was not likely unilaterally to raise its prices, thereby permitting the Free Press to follow suit and perhaps become profitable. As the Attorney General noted (JA 148-149), Mr. Neuharth, Gannett's CEO, testified that maintaining existing prices and awaiting the demise of the Free Press was something that Gannett was "prepared to do," despite the "heavy price tag" of its own continuing losses in the interim. JA 228-229. Mr. Neuharth expressed confidence that the News' policy of not raising prices ultimately would result in "The Detroit News [being] the only surviving newspaper," be it in "one year, three, five [or] ten." *Ibid.*

No rule of law required the Attorney General to disbelieve this account of the News' strategy, which comported with the views of expert witnesses (see, *e.g.*, JA 306, 320-321) and with sound business judgment. After all, the News had achieved market dominance by maintaining its circulation and advertising advantages. It would have been perverse for the News to give up the fight with victory at hand, and thereby risk losing its commanding lead over the Free Press. As Gannett's CEO candidly acknowledged, the News viewed itself as in a "win, win" situation, with failure of the Free Press as the alternative to a JOA. JA 225-226, 228-229. Thus, as the Attorney General concluded, "it hardly reflects unsound business judgment to retain a while longer the News' current depressed pricing practices with so

many indications that the Free Press and Knight-Ridder have abandoned all hope of market domination." JA 149. See Pet. App. 157a.

Similarly, the Attorney General's prediction that the Free Press would close its doors if a JOA were denied was well grounded in fact. Alvah H. Chapman, Jr., Chairman and CEO of Knight-Ridder, testified during cross-examination as follows (JA 283):

> Q. By your testimony just before the break you did not mean to suggest, did you, that the only alternative to a JOA is closure of the Free Press and selling off assets, did you?
>
> A. I meant to emphasize exactly that, sir.

Far from being a "bolt out of the blue" (Pet. Br. 9-10), this representation was fully substantiated by Mr. Chapman, who offered a lengthy, detailed, and reasoned explanation why the Free Press would have to shut down absent a JOA (see JA 264-271), and was bolstered by documentary evidence establishing that Knight-Ridder considered closing the Free Press as early as 1982 and 1985. AX 514 C; IX 42 B, C; JA 413; Tr. 1793. More important, it also was supported by common sense: a business locked into escalating losses, with no ability to eliminate those losses, and with no reasonable hope of returning to profitability, cannot be expected to remain in operation indefinitely. As the Attorney General remarked, "[i]t would be neither counterintuitive nor contradictory for Knight-Ridder to [close the newspaper] upon concluding, after all these years, that the Free Press no longer had long-term prospects for market domination nor a more immediate opportunity through unilateral action to reverse its string of annual operating losses." JA 149.

Finally, the Attorney General reasonably determined that approval of the JOA would comport with the policy and purpose of the NPA. The events that led to the financial

distress of the Free Press were the result of "[k]een competition aimed at market domination and future profitability—competition waged energetically but both responsibly and properly." JA 151. The Attorney General agreed with the ALJ that "this is not a situation where the Free Press has brought itself to the brink of financial failure through improper marketing practices or culpable mismanagement." *Ibid.* And in light of the evidence that the Free Press was likely to close if the JOA were denied, the Attorney General correctly concluded that "approval of the JOA will plainly further the legislative purpose of preserving multiple editorial voices in Detroit—an outcome that does not appear to be in the future otherwise." JA 152.

In sum, the Attorney General "accepted as accurate the fact findings" of the ALJ, but differed "with his ultimate conclusion as to where those facts lead." JA 153. In the Attorney General's view (JA 153-154),

> the continuing and persistent operating losses suffered by the Free Press over the course of nearly a decade, with no prospect of unilaterally reversing that economic condition in the foreseeable future, describes a newspaper "in danger of financial failure." Because its competitor leads in virtually all economic indices, is prepared (indeed committed) to continue its depressed pricing practices at levels below the Free Press in order to insure that the *News* maintains its circulation and advertising advantages, and undoubtedly has the ability on such terms to outlast the Free Press, the very real potential for failure becomes highly "probable".

This conclusion, as both lower courts found, is fully supported by the evidence. See pp. 16-21, *supra*.

Petitioners attempt to undermine the Attorney General's predictions by mischaracterizing the record and by relying on conclusions and speculations of the ALJ that the Attorney General was not bound to accept. For example,

although petitioners assert, without citation, that "the ALJ concluded that the Free Press was a healthy paper" (Br. 23), the ALJ in fact confirmed that the News led the Free Press "in most circulation, revenue, and linage measures of the rivalry between two competing metropolitan newspapers." Pet. App. 120a. The ALJ also found that

> there can be no serious question that between 1979-1986 the Free Press had deep operating losses, that it did not generate an adequate cash flow to cover actual operating expenses, that given its poor financial performance it was unlikely to find funding elsewhere, and that without advances from Knight-Ridder (or some other parent) it could not continue as a going concern on a stand-alone basis.

Id. at 81a-82a (citations omitted). This hardly characterizes a "healthy" or "competitive" newspaper.

Petitioners also seek to impeach the Attorney General's findings by referring (Br. 22) to the Free Press' decision to expand its printing plant in 1985. But, as Knight-Ridder's CEO explained, the Knight-Ridder board of directors "was influenced in its decision by my assurance that the additional printing presses and related equipment that the Free Press was to receive could be used elsewhere in the Knight-Ridder system if the Free Press ultimately failed." JA 413. Similarly, contrary to petitioners' suggestion (Br. 23), the eventual 50/50 profit split between the Free Press and the News hardly represented the newspapers' belief that the Free Press was financially sound. Rather, the division of profits under the JOA reflected the parties' realization that Knight-Ridder had the resources and perceived determination to keep the Free Press alive, and thus to extend the News' own losses, indefinitely. See JA 421, 443-444; Tr. 1918-1919; JA 228-229.

2. The Attorney General's determinations plainly satisfy the standards of the NPA.

We have shown above that the Attorney General's factual findings and predictions, which were upheld by the district court and the court of appeals, are fully supported by the administrative record. Once petitioners' spurious challenges to those factual determinations are cleared away, there can be no serious question that the requirements of the Newspaper Preservation Act were met in this case and that the Attorney General's decision to approve the JOA was not arbitrary or capricious. Petitioners try to muddy the waters by arguing that the courts below affirmed the Attorney General's ruling only by deferring—improperly in their view—to his interpretation of the statute. See Pet. Br. 14, 29-39. But petitioners' long-winded diatribe about "deference" is a red herring: even if *no* deference at all is accorded to the Attorney General's view of the NPA, the undisputed facts relied on by the Attorney General unquestionably satisfy the statutory standard.[5]

a. *Failing Newspaper.* The NPA empowers the Attorney General to approve a JOA whenever he determines that one of the newspapers involved in the arrangement is a "failing newspaper." 15 U.S.C. 1803(b). The statute defines "failing newspaper" to mean "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. 1802(5). Thus, to be eligible for a JOA, a newspaper need not have suffered a financial failure; it need not even be in grave danger of financial failure. See pp. 7-8, *supra*. Rather, Congress determined that an applicant need only demonstrate that it is in "*probable danger of financial failure.*" That phrase may be difficult to apply in some circumstances, but it is remarkably easy to apply here: in view of the evidence recounted above—showing multi-million dollar

5. As explained on pp. 40-41, *infra*, the Attorney General's decision plainly is entitled to substantial deference.

losses for nearly a decade, accelerating deficits in nearly every year despite a massive infusion of cash from Knight-Ridder, substantial competitive disadvantages in almost every economic category, continuing fierce competition from the News, and no unilateral solution that could restore profitability—it is inconceivable that the Free Press could be found not to meet the statutory standard.

For their part, petitioners make no effort to propound a test for determining when a newspaper is in "probable danger of financial failure." Instead, they submit that "in this case, the Court need not formulate an all-inclusive test" (Br. 21), but can overturn approval of the JOA simply because there was no proof of a "downward spiral" (Br. 20-21), because "the prospect of a JOA was an essential factor in the Free Press' losses" (Br. 21), and because approval of the application "would jeopardize healthy newspapers in other cities." Br. 21. The factual premise for these assertions is completely erroneous. See pp. 42-44, 45-48, *infra*. But more important, the statutory definition of a "failing newspaper" speaks not a word about "downward spirals," "the potential of the market to support two papers," "normal market forces," "other cities," "essential factors" or any of the other nebulous criteria or litmus tests that petitioners would engraft onto the Act. Br. 13, 20-22. Rather, Congress clearly provided that a newspaper is a "failing newspaper" if it is in "probable danger of financial failure"—in other words, if it is likely to go out of business because of irreversible monetary losses. That is exactly what the evidence showed and the Attorney General found. Petitioners' position simply ignores the language of the statute, which focuses solely on the present and future economic status of the newspaper seeking approval of a JOA.[6]

6. Petitioners argue at some length (Br. 13, 19-20) that the Attorney General was required to apply the "probable danger of financial failure" test in light of the standard used in granting antitrust exemptions under the Bank Merger Act, 12 U.S.C. 1828(c) (1964 ed., Supp. II), as interpreted in *United States* v. *Third National Bank*, 390 U.S. 171, 188-189 (1968). But petitioners offer no reason to believe that the Attorney General did not do so. Petitioners acknowledge (Br. 19-20) that the Justice Department has referred to *Third National Bank* in ruling on JOAs, that the ALJ did so in this case, and that the Ninth Circuit relied on that standard in its decision in *Hearst*, 704 F.2d at 476-477, which the Attorney General expressly followed here. JA 146-147. More important, petitioners do not explain why the JOA should have been disapproved under *Third National Bank*. The Attorney General agreed with the ALJ's findings that the Free Press losses were *not* caused by mismanagement (JA 151; Pet. App. 102a-104a, 120a-121a, 128a) and that there was *no* strategy that the Free Press could unilaterally adopt to save itself (JA 146; Pet. App. 122a).

What is more, by repeatedly trumpeting the Free Press' strenuous efforts to remain competitive with the News (see Br. 22-24)—without ever acknowledging that these efforts were totally dependent upon enormous subsidies from Knight-Ridder—petitioners also ignore Congress' express direction that the NPA be applied without regard to a newspaper's "ownership or affiliations" (15 U.S.C. 1802(5)). Here, of course, were it not for the $176 million life-support system provided by Knight-Ridder over the past decade, the Free Press would not merely have been "failing"—*it would have failed many years earlier.* The Attorney General correctly understood this critical fact. See JA 147-148 ("were it not for a major infusion of millions of dollars by its parent, there is every reason to assume that the Free Press would have failed long ago").

Petitioners' amorphous presentation not only fails to offer a reasoned and coherent interpretation of the NPA, but also fails to explain what course of action the Free Press could prudently follow, other than to enter into a JOA or go out of business. As the district court noted, petitioners' "prediction[] about a bright future * * * comes with no timetable and no guarantee of probability, and does nothing to change the Free Press' *current* status as in 'probable danger of financial failure.'" Pet. App. 157a (emphasis in original). Petitioners presumably propose to have the Free Press bleed for several more years (or collude with the News to raise

prices). But "[t]he NPA does not require that a newspaper publisher suffer massive losses by keeping the publication in business during unprofitable years." *Ibid.* Thus, petitioners' arguments are directly contrary to the plain language of the Newspaper Preservation Act.

Where, as here, Congress has stated its intent in terms that clearly encompass the case at hand, there is "no need for a court to inquire beyond the plain language of the statute." *United States* v. *Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026, 1030 (1989). Nonetheless, nothing in the legislative history of the NPA conflicts with its language or supports petitioners' suggestion that Congress did not intend the Act to apply in a case such as this. To the contrary, it is evident from Congress' express repudiation of the *Citizen Publishing* decision that it intended the "failing newspaper" standard to be significantly broader than the "failing company" defense under the antitrust laws, which required proof that the company was on the brink of collapse. See *Citizen Publishing*, 394 U.S. at 137 (JOAs violated pre-NPA law unless one newspaper faced a "grave probability of a business failure" and was "on the verge of going out of business").

The legislative history shows that Congress was acutely aware that normal competitive conditions peculiar to the newspaper industry can precipitate financial failures in two-newspaper cities, with the consequent loss of independent editorial voices. See H. R. Rep. No. 91-1193, 91st Cong., 2d Sess. 3-4 (1970); see also pp. 3-6, *supra*. And Congress also was aware that the "failing company" defense recognized under the antitrust laws was "inadequate for newspapers" (116 Cong. Rec. 23168 (1970) (Rep. Annunzio)) and "has been of little value to the newspapers" (*id.* at 23173 (Rep. Boggs)), because it was not available early enough to prevent the dominant paper from merely sitting back and awaiting the demise of its rival. See, *e.g.*, *Hearst*, 704 F.2d at 479 n.10; 116 Cong. Rec. 1786 (1970) (Sen.

Bennett); *id.* at 1788 (Sen. Fong). Accordingly, Congress sought "to establish a less stringent test than that applied in *Citizen Publishing*" (*ibid.* (quoting Senate Report at 4)) in recognition of the fact that "[t]he strict standard * * * is not applicable to newspapers as a dying daily cannot recover its lost circulation and advertising revenues by its sole efforts." *Id.* at 23166 (Rep. Adair).

Petitioners' construction of the NPA would frustrate these goals in several respects. First, petitioners' insistence that the NPA must be given a grudging or restrictive interpretation would be wholly inconsistent with Congress' decision to overturn *Citizen Publishing*—which had itself adopted a narrow interpretation of an exemption from the antitrust laws. Thus, acceptance of petitioners' submission would nullify Congress' efforts to preserve important First Amendment values by giving editorial and reportorial diversity precedence over stringent anti-merger doctrines announced by the courts.

In addition, petitioners' position, which suggests that a failing newspaper must produce "convincing evidence of an irreversible economic condition that would produce domination and a downward spiral" (Pet. Br. 20), would reinstate the inevitable failure standard of *Citizen Publishing* and would delay relief under the NPA until it was too late to do any good. By the time a failing newspaper could surmount the evidentiary barriers petitioners propose, the newspaper's financial condition would have so far deteriorated that the dominant paper would have every incentive to wait for its rival to fail, and thereby gain a complete monopoly, rather than negotiate a JOA. By engrafting such unwritten restrictions onto the NPA, petitioners clearly reveal their hostility to the statute Congress actually enacted.

b. *Policy and purpose of the NPA.* The NPA also requires the Attorney General to determine that approval of a JOA would "effectuate the policy and purpose of" the Act. 15 U.S.C. 1803(b). Congress identified that policy

and purpose as the maintenance of "a newspaper press editorially and reportorially independent and competitive in all parts of the United States." 15 U.S.C. 1801. Here, too, the Attorney General's decision was fully consistent with the statutory mandate.

The Attorney General expressly recognized that the NPA was intended to achieve "two overarching policy objectives: the more general pro-competitive objective of the antitrust laws, and the specific objective of preserving 'editorially and reportorially independent and competitive' newspapers." JA 150. The Attorney General determined that approval of the JOA would serve the goal of preserving editorial diversity because the Free Press was likely to go out of business in the absence of a JOA, thereby leaving the News without competition in one of the nation's largest markets. JA 151. As the Attorney General explained: "To stand by and watch the paper's demise would poorly serve the Act's policy disfavoring a newspaper monopoly in the City of Detroit." *Ibid.* By the same token, the Attorney General was equally sensitive to the "more general" objectives of the antitrust laws. Thus, the Attorney General emphasized that the Free Press' financial problems were the result of "[k]een competition" (JA 151), rather than "improper marketing practices or culpable mismanagement" (*ibid.*), and were not the product of an effort to produce a JOA. See JA 152.

Once again, it is impossible to conclude that the Attorney General's judgment in these matters was arbitrary or capricious. The Attorney General applied the standard set forth in the statute and explained his decision fully. Where, as in the case of the Free Press, a newspaper has been driven to the brink of financial failure through lawful competitive conduct, consistent not only with the antitrust laws but also with the "market reality" in the newspaper industry (JA 149), and where approval of a JOA "will plainly further the legislative purpose of preserving multiple editorial voices in

Detroit—an outcome that does not appear to be in the future otherwise" (JA 152), the policy and purpose of the NPA would demonstrably be ill-served by denial of a JOA.

As the district court and the court of appeals recognized, decisions such as this, requiring predictive judgments and reconciliation of policy objectives entrusted to an agency for implementation, are entitled to substantial deference. Speculating that the News "may eventually initiate circulation price increases," the ALJ proposed what the court of appeals aptly called a "high stakes regulatory game" with the future of the Free Press, gambling that the News (contrary to its representations) would abandon its decade-long competitive strategy and raise its prices, thereby permitting both papers (for the time being) to perhaps become profitable. Pet. App. 92a, 187a. The Attorney General—"concerned that if he gambled on the ALJ's prediction that both newspapers were bluffing, Detroit would lose a newspaper" (Pet. App. 187a)—drew different inferences as to the likely outcome from the facts, inferences left undisturbed by two lower courts. That decision was, quite simply, his to make under the NPA.

C. Petitioners' Have Failed To Identify Any Defect In The Attorney General's Legal Analysis.

Petitioners attempt to divert attention from the Attorney General's unassailable factual findings, which have been upheld by both courts below, and the language of the NPA, which plainly encompasses this case, by including in their brief a grab-bag of unrelated arguments designed to cast doubt on the Attorney General's determination. These contentions are devoid of merit.

1. This case presents no conflict between *Chevron* and any canon of statutory construction.

Petitioners devote nearly half of the argument portion of their brief (Br. 29-39) to the contention that the Attorney

General failed to abide by the canon of statutory construction that exemptions from the antitrust laws should be narrowly construed, and that the court of appeals failed to correct the Attorney General's error because it mistakenly believed itself bound to adopt the Attorney General's approach under the rule of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). We have already shown that this "deference" argument is irrelevant because the statute plainly covers this case. Petitioners' argument in any event is insubstantial.

First, petitioners are simply wrong in suggesting that the Attorney General ignored the canon of construction. The Attorney General expressly adopted the interpretation of the statute set forth in *Hearst* (see JA 146-147), which was fashioned by the Ninth Circuit pursuant to the principle that antitrust exemptions "must be narrowly construed." 704 F.2d at 478. The Attorney General's construction of the statute thus takes account of the very principle that is the cornerstone of petitioners' argument. See also Pet. Br. 29-30 (conceding that the Attorney General "never indicated that he intended to reject [the canon], or that he believed he would have had the authority to do so").

Second, the court of appeals correctly concluded that the Attorney General's interpretation of the NPA is entitled to deference. As petitioners themselves recognize (Br. 34), the principle that deference should be accorded to decisions by the administrative officer selected by Congress to implement a statute has long been a part of our jurisprudence. See *Chevron*, 467 U.S. at 843-845 & n.14 (collecting cases); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978). There is no reason why a contrary rule should apply under the NPA.[7] Since the Attorney General took all

7. The fact that "Congress expected the courts to construe the Act" (Pet. Br. 35) provides no support for the extraordinary rule advocated by petitioners: that courts owe the Attorney General no deference in determining what the NPA means. Cases suggesting that little deference is due to administrative interpretations of the antitrust laws (Pet. Br. 34-35, 38) are beside the point here. At issue in this case is the scope of a statute that carves out an *exemption* from the antitrust laws and that is implemented by an administrative officer.

Moreover, it is the decision of the Attorney General rather than the Antitrust Division that is entitled to deference. Because the NPA effectuates antitrust policies *and* other societal values of overriding importance (see p. 4, *supra*), the Attorney General, not the Antitrust Division (which vehemently opposed passage of the Act) is entrusted with its implementation. See pp. 7-8, *supra*. Indeed, this was the third of five JOA applications that was approved by an Attorney General over the opposition of the Antitrust Division.

relevant factors into account in applying the statute, contradicted none of its provisions, and fully explained his rationale, his determination clearly is entitled to judicial deference.

More fundamentally, petitioners' argument uses canons of construction in a purely mechanical fashion, to override literal statutory language, legislative history, and administrative discretion in a single stroke. In petitioners' hands, canons of construction implement free-floating policy preferences unrelated to the legislation Congress actually enacted. But in fact, canons of construction are merely common-sense guides for ascertaining congressional intent. See *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979) ("[t]he ultimate question" in construing a federal statute "is one of congressional intent"). In other similar contexts, this Court has refused to construe antitrust exemptions "narrowly" where the proffered narrow construction would defeat significant competing interests recognized by Congress. See, *e.g.*, *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 220-221, 223 (1980) (the patent exemption from the antitrust laws should not be construed narrowly because the policy of the patent system to stimulate invention "runs no less deep" than the antitrust policy of free competition). As we have discussed in detail above, the decision of the Attorney General, protecting important

First Amendment values, accords completely with Congress' intent in enacting the NPA.

Petitioners also do not explain what a "narrow" construction of the NPA would require JOA applicants to demonstrate. Indeed, their approach to the NPA is one of indiscriminate hostility toward JOAs, a view of the statute that surely contravenes congressional intent. The *Hearst* court pointed out that, while exemptions from the antitrust laws should be construed narrowly, courts are not free to "emasculate the [NPA] in the guise of narrowly construing it." 704 F.2d at 483. That is precisely what petitioners seek to do. In petitioners' view, the NPA was intended to preserve *commercial* competition between newspapers. Selectively quoting from the statute itself, petitioners assert that the NPA "emphasizes 'the public interest of maintaining a newspaper press [that is] competitive in all parts of the United States.'" Pet. Br. 18 (quoting 15 U.S.C. 1801 (brackets added by petitioners)). In fact, the provision of the NPA cited by petitioners expresses the quite different purpose of seeking to preserve "a newspaper press *editorially and reportorially independent and* competitive" (language omitted by petitioners emphasized). Congress' overriding objective was to effectuate the First Amendment goal of preserving "competition in ideas." 116 Cong. Rec. 23154 (1970) (Rep. Railsback). Petitioners' crabbed construction of the statute would frustrate achievement of that vital objective.

2. The Attorney General correctly concluded that the Free Press' losses were the product of normal market forces, not an effort to obtain a JOA.

Petitioners argue (Br. 7-8, 21) that the JOA application should have been denied because the prospect of a JOA was an "essential factor" in the business decisions that led to the Free Press' accelerating losses. In fact, the Attorney General found that the prospect of a JOA was *not* an essential

factor in the Free Press' losses. The Attorney General (affirmed by the courts below) instead found that "the heavy expenditure of investment capital by Knight-Ridder over [the past decade] belies the notion that it was principally pursuing any end other than market domination." JA 152. And the record makes clear that, far from being an outgrowth of JOA discussions, the Free Press' aggressive competition began long before the first such discussions took place. Pet. App. 16a-18a; JA 51-52.

Furthermore, there is nothing sinister about the fact that officials from the two papers engaged in on-and-off discussions about a possible JOA for years before the agreement actually was consummated. That pattern is a typical one. See JA 196-197 (nine years of discussions preceded the Seattle agreement); *id.* at 191-194 (almost four years of negotiations preceded the Cincinnati agreement). Congress plainly did not intend the newspaper industry to feign ignorance of the NPA.[8]

Petitioners nonetheless contend (Br. 14) that the prospect of a JOA prompted "reckless competition" between the Free Press and the News and that the Free Press' losses did not result from "normal market forces" (Br. 13). Again, there is no warrant for overturning the Attorney General's factual findings that the competitive struggle was waged "energetically but both responsibly and properly" (JA 151) for the principal purpose of achieving market leadership (*id.* at 152)—precisely the competitive conditions

8. Petitioners argue (Br. 7-8) that a reference in a 1981 Knight-Ridder memorandum to mounting Free Press losses, and to the probability that the paper would qualify as a "failing newspaper," suggests some vague intent to collude with the News in order to secure a JOA. There is no merit to that assertion. The record is clear that the News' owner refused to enter into a JOA in 1981, refused to even discuss a JOA seriously thereafter, and sold the paper in 1985 without having agreed to a JOA. See p. 12 *supra*.

addressed by Congress when it passed the NPA. See pp. 4-6, *supra*.[9]

3. The Free Press did not have to be offered for sale in order to be eligible for a JOA.

The NPA does not require an applicant to attempt to sell a failing newspaper in order to become eligible for a JOA. *Hearst*, 704 F.2d at 475-476 (collecting legislative history). Nonetheless, an *amicus curiae* brief filed in this Court by William D. McMaster, a public relations specialist with no experience in newspaper management, makes grossly inaccurate factual representations (which have no support in the administrative record) concerning the availability of an unidentified "investor group" to purchase the Free Press. In fact, there is no alternative to closure of the paper if a JOA is not soon implemented. See JA 286. Both the ALJ and the Attorney General found that even Knight-Ridder, with its large financial resources and experience in the newspaper business, could not reverse the Free Press' spiraling losses. Pet. App. 122a; JA 145-146; see JA 273.

As Knight-Ridder's CEO testified, "any other owner would be facing the identical problem. The economics do not change because of ownership." JA 273. Indeed, it is absurd to suppose that the Free Press could be extricated from its disastrous financial predicament by being sold to an

9. Petitioners cite the ALJ's statement "that the Free Press had rejected several opportunities to escape the competitive struggle because it believed it could win dominance in the Detroit market, with the JOA as a cushion to fall back on if it failed. Pet. App. 17a-19a." Br. at 28. Among those lost "opportunities" was the refusal of the Free Press to "signal[] the News to 'cool it somewhat' until the [Detroit] economy 'turns up,' " and the fact that the Free Press "seemed to be impervious to any attempts by the News either 'to coach' it into [abandoning advertising discounts], or to change its 'style of competition' by a demonstration of the high cost of continued discounting." Pet. App. 19a & n.37. As the Attorney General properly concluded, this conduct is precisely the type of vigorous price competition favored by the antitrust laws.

owner with shallower pockets than Knight-Ridder. Searching for a new owner who would cast aside the signed JOA only to find that the Free Press' losses cannot be reversed would simply guarantee the paper's demise.

D. The Attorney General's Decision Establishes No Adverse Precedent.

Petitioners also urge disapproval of the JOA because they believe that the Attorney General's decision may serve as a "roadmap" for obtaining JOAs that will "jeopardize healthy newspapers in other cities"—an argument that they raised for the first time in the court of appeals. See Pet. Br. 21, 25-26.[10] Petitioners suggest that the Attorney General approved the JOA merely upon a showing of losses for several years and a statement from the dominant paper that it would not raise prices. They claim that these criteria can be easily satisfied by initiating a "predatory pricing scheme" and securing a promise from a competitor that it will not hike prices. *Id.* at 27. In petitioners' view, the Attorney General would be helpless under such circumstances and would be forced to approve a JOA. This scenario is completely fanciful.

The Attorney General's opinion is not, and cannot be, reduced to the simplistic formula suggested by petitioners. Rather than relying merely upon two factors, the Attorney General canvassed in detail the Free Press' unsuccessful struggle for market leadership and its irreversible economic predicament. JA 143-146. He determined that the Free Press had engaged in keen and lawful competition, motivated by the desire to become the leading paper in Detroit.

10. Profitable junior papers are, in fact, almost non-existent (see p. 4, *supra*). They are threatened not by JOA rulings but by inexorable competitive forces that have existed in nearly every city in the United States throughout this century.

JA 151-152. Plainly, the Attorney General's decision cannot be divorced from its factual underpinnings when considering its precedential significance.

At the heart of petitioners' argument is the implicit assumption that the Free Press should be "more bloodied" (Pet. App. 190a) before being granted relief, apparently to prevent JOAs from becoming too easy to secure. But the facts of this case well illustrate how difficult it is to negotiate a JOA. For years the News rebuffed any proposal for a JOA, despite its own large losses. See p. 12, *supra*. In most markets, there is only a brief and uncertain opportunity to reach a JOA agreement. If a junior paper becomes too weak, the agreement will never be executed: it will "be more advantageous for the dominant paper to let the ailing paper die and enjoy the benefits of a natural monopoly rather than entering a joint agreement." *Hearst*, 704 F.2d at 479 n.10. The difficulties inherent in securing a JOA are compounded by administrative and litigation delay, leaving the junior paper (now branded as a "failing" enterprise) to suffer escalating financial losses, depletion of advertising patronage, and employee demoralization. Pet. App. 42a, 121a.[11]

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11. These practical considerations weigh heavily against the suggestion of Judge Ginsburg (Pet. App. 191a) that this case be "remanded" for further proceedings before the Attorney General. A remand of this already protracted matter would serve no purpose on this record. But it would pose a grave risk to the Free Press and to Congress's goals under the NPA. Sustaining the Free Press during several more years of litigation is more than just a matter of losing immense sums of money. Maintenance of the skilled workforce and employee morale needed to produce a high quality newspaper is enormously difficult once a JOA application has been filed. As the ALJ observed, "once an agreement is announced it has an adverse effect on the morale and performance of the designated 'failing newspaper.'" Pet. App. 42a. While the economic performance of the Free Press was seriously adverse prior to 1986 (see App., *infra*, at A-1 to A-3), it has substantially worsened in the last three years for the reasons stated by the ALJ.

In short, the practical effect of petitioners' effort to raise new obstacles to the JOA approval process would be to render this remedial statute a dead letter. Petitioners' interpretation would severely deter the owners of failing newspapers from pursuing a JOA, placing additional pressure on them to liquidate the junior paper, redeploy its assets, and terminate its losses.

Nor is there merit to petitioners' claim that the Attorney General's decision will encourage "predatory pricing." Petitioners do not bother to explain why a dominant paper, allegedly committed to pursuing long-run profits through short-term losses and capable of "driving an unwilling competitor into a JOA" through low prices (Pet. Br. 26 n.7), would stop there when a little more forbearance would yield a complete monopoly and eliminate any need to share future profits. See *Citizen Publishing*, 394 U.S. at 137-138 (noting that a dominant paper would have little incentive to enter into a JOA if its competitor "was on the brink of collapse"). The long list of papers that have died without being able to negotiate a JOA makes clear that the most attractive alternative for a dominant paper is simply to await the demise of its rival. See, pp. 3-4, *supra*.

In this context, it is particularly irresponsible for petitioners and their supporting *amicus* to suggest that either or both of the Detroit papers engaged in "predatory pricing." Pet. Br. 26-28; Little Rock Br. 16-21. This conclusory charge, raised for the first time when petitioners sought rehearing in the court of appeals (Pet. App. 203a & n. 4), is completely devoid of evidentiary support. No party to the administrative proceeding suggested that the "rare[]" event (Pet. App. 208a) of predatory pricing could be discerned on this record, not even the Antitrust Division, which characterized the Free Press' conduct as part of a "vigorous competitive battle to improve its market position." JA 97. And the Attorney General specifically found that the competition between the papers had been waged "responsibly

and properly" and in full conformity with the law (JA 151, 153).

Most illogical of all is petitioners' bald assertion that "absent the fall-back of a lucrative JOA, there would be no reason for any newspaper to assume the enormous risk of losing money for years in the hope of driving a competitor from the market." Pet. Br. 26. The Newspaper Preservation Act is premised on exactly the opposite view. For decades prior to passage of this statute, newspapers across the nation recognized that losing money to defend against the loss of readers and advertisers is often the only way to avoid second-paper status and financial failure. The "enormous risk" imposed on these papers by competitive conditions caused hundreds of newspaper failures in two-paper cities, leading Congress to approve the JOA alternative. The ALJ expressly noted that experienced newspaper executives at the News and the Free Press believed that the costly pursuit of dominance was the only "rational" business strategy in Detroit. Pet. App. 120a.[12]

What remains is petitioners' final assertion (Br. 27) that a future Attorney General would have no choice but to rubber-stamp a JOA that was part of a "predatory pricing scheme" or that arose from competition that did not aim for commercial success. But the Attorney General's decision demonstrates that this is not true. The Attorney General considered, but rejected as factually unsupported, the claim

12. Petitioners' reference to a "lucrative JOA" apparently stems from their view (Br. 18) that a JOA in Detroit would yield monopoly profits. This argument conveniently overlooks the fact that newspapers presently have such nominal "monopolies" in the overwhelming majority of American cities (see pp. 3-4, *supra*), but their ability to raise prices above competitive levels is restrained by intense and rapidly increasing competition from other news sources and advertising outlets, including broadcast television, cable television, radio, magazines, national papers, non-daily papers, shopper handouts, billboards, electronic publishing, and direct mail. JA 377, 549-555. It overlooks, moreover, that without a JOA the Free Press will close, leaving the News with the very "monopoly" petitioners fear.

that the JOA in this case was the outcome of a scheme to win a JOA rather than vigorous competition. JA 151-152. He imposed the affirmative requirement that the conduct leading to a JOA be consistent with the broad goals of the antitrust laws. JA 150-152. Both the district court and the court of appeals similarly emphasized that publishers pursuing improper pricing strategies will find no safe harbor in the Attorney General's decision. Pet. App. 160a-161a, 189a-190a & n.13. And in this Court, the brief filed on behalf of Attorney General Thornburgh emphasizes that "the Attorney General could deny the application if the record showed that two newspapers had deliberately created operating losses as a means of obtaining a JOA. This could be true even if ultimately obtaining a JOA had not been the exclusive goal of the applicant newspapers." U.S. Br. in Opp. 19.

* * * * *

None of the arguments advanced by petitioners can obscure the proposition that this is a case that turns on its facts. Is it probable that the News will abandon its low prices and remove competitive pressure from the Free Press? Is it probable that the Free Press will remain in business if it must continue to meet the low prices of the News? The Attorney General answered both questions in the negative, and his opinion rests on economic evidence that leaves no doubt that his predictive judgment was a reasonable one. This Court should not retry the factual issues, which have now been settled by the Attorney General, the district court, and the court of appeals. Taking those facts as settled, there is, we submit, no sensible basis for the contention that the Newspaper Preservation Act forecloses relief to the Free Press.

Nor should this Court blind itself to the fact that a great newspaper will surely die if the JOA is denied (see U.S. Br. in Opp. 5 n. 4), a result that would subvert the policy expressly declared by Congress in the NPA. Founded in 1831, the Free Press has addressed national and local issues

of the day with independence and integrity. And it brings to the Detroit community an editorial and reportorial viewpoint that is distinct from that of the News. From political endorsements to race relations, the Free Press' progressive viewpoint presents an ongoing debate with the News. The debate that the two newspapers bring to the people of Detroit is of inestimable value to the political process and the goals secured by the First Amendment.

The Congress that passed the Newspaper Preservation Act would not want this newspaper to die or to sacrifice the jobs of its 2,100 employees. The literal language that it used in the Act makes that intention inescapably clear. In these circumstances, this Court should sustain the decision of the Attorney General in accordance with the rulings of both courts below.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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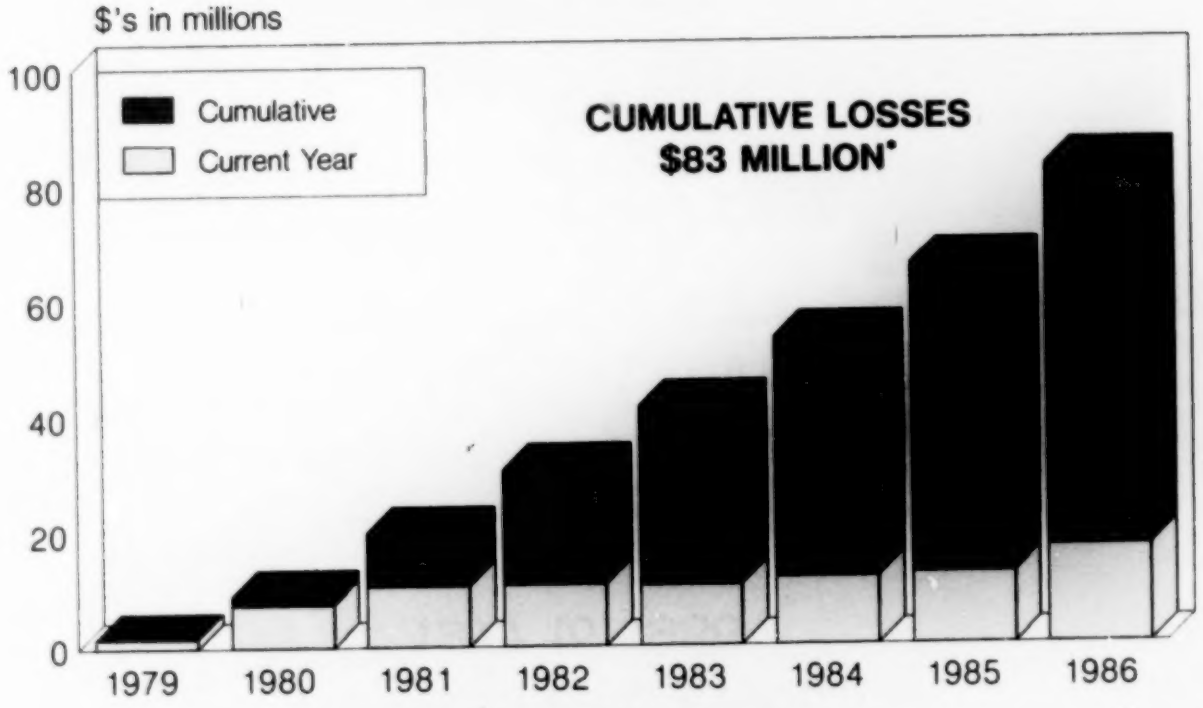
DATED: AUGUST 1989

APPENDIX

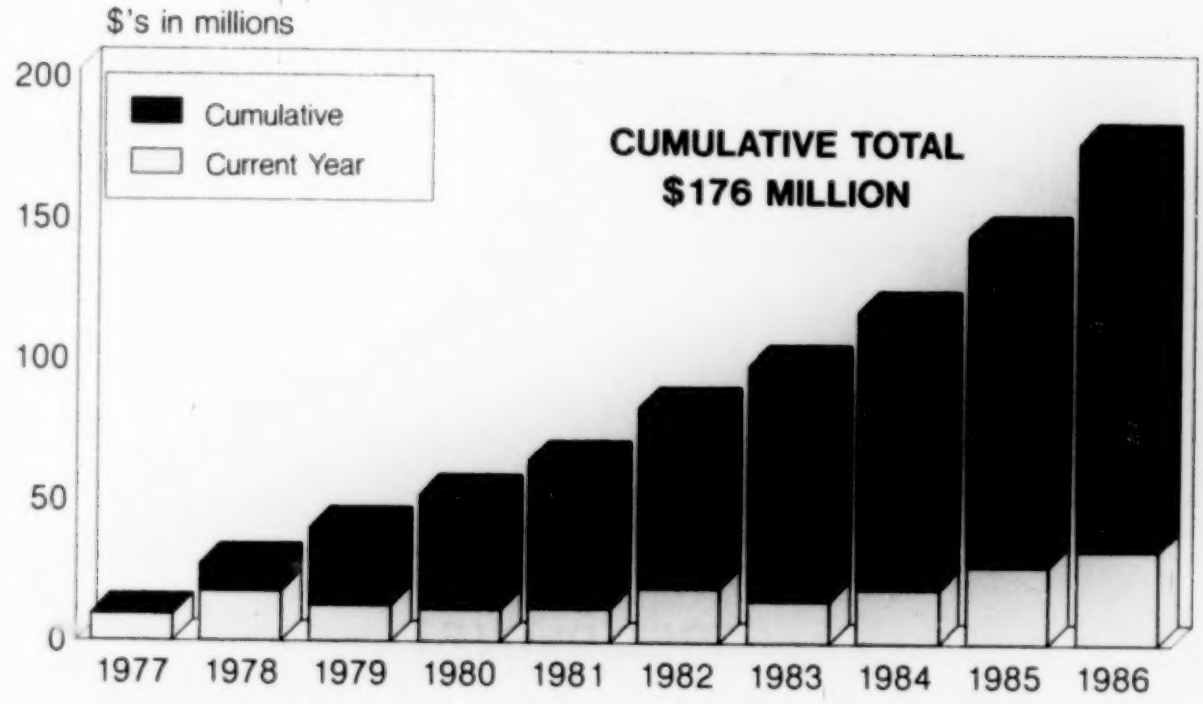
FREE PRESS OPERATING LOSSES
1979 to 1986



***From 1979 to 1986, cumulative losses for The News were $48 million.**

Source: NX 603A; NX 615A

KNIGHT-RIDDER CASH ADVANCES TO THE FREE PRESS 1977 to 1986



Source: NX 603C; JA 531

A-2

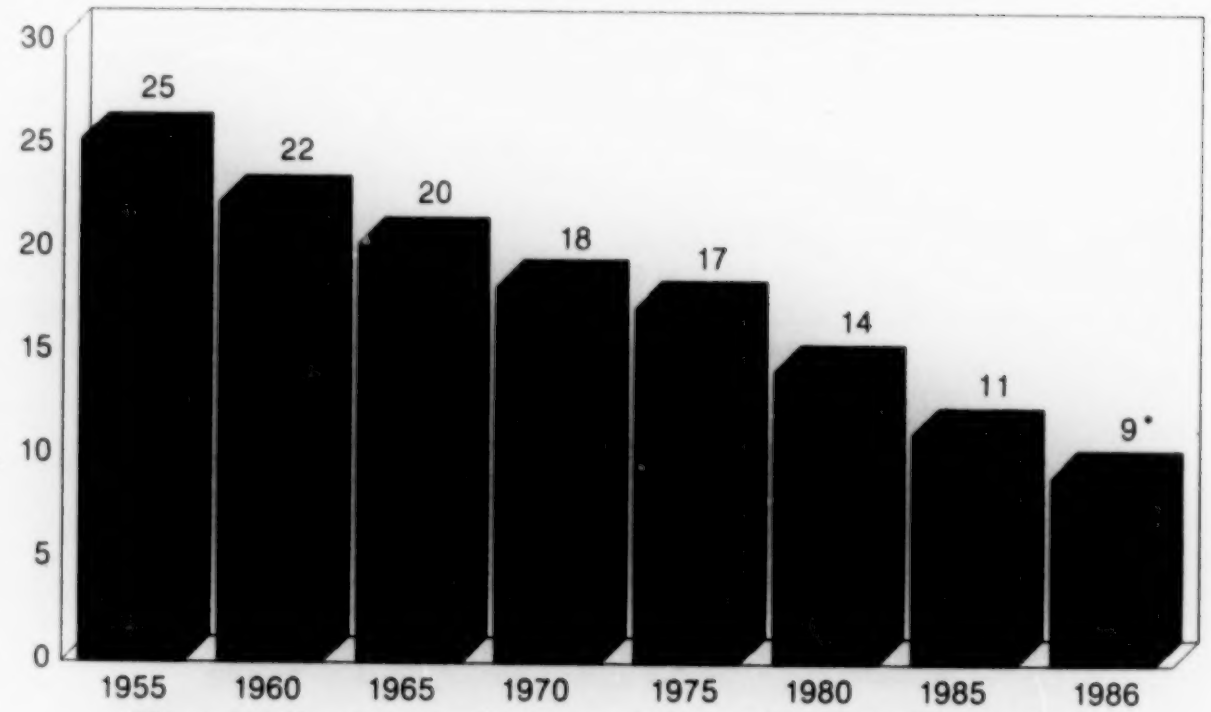
1986 LEAD OF NEWS OVER FREE PRESS IN RELEVANT ECONOMIC CATEGORIES

	NEWS	FREE PRESS	NEWS LEAD
TOTAL REVENUE (1)	$229,630,000	$168,310,000	$61,320,000
ADVERTISING REVENUE (1)	$190,725,000	$121,428,000	$69,297,000
TOTAL ADVERTISING LINAGE (2)	54,653,821	34,653,944	19,999,877

(1) NX615A and NX603A
(2) NX2R

A-3

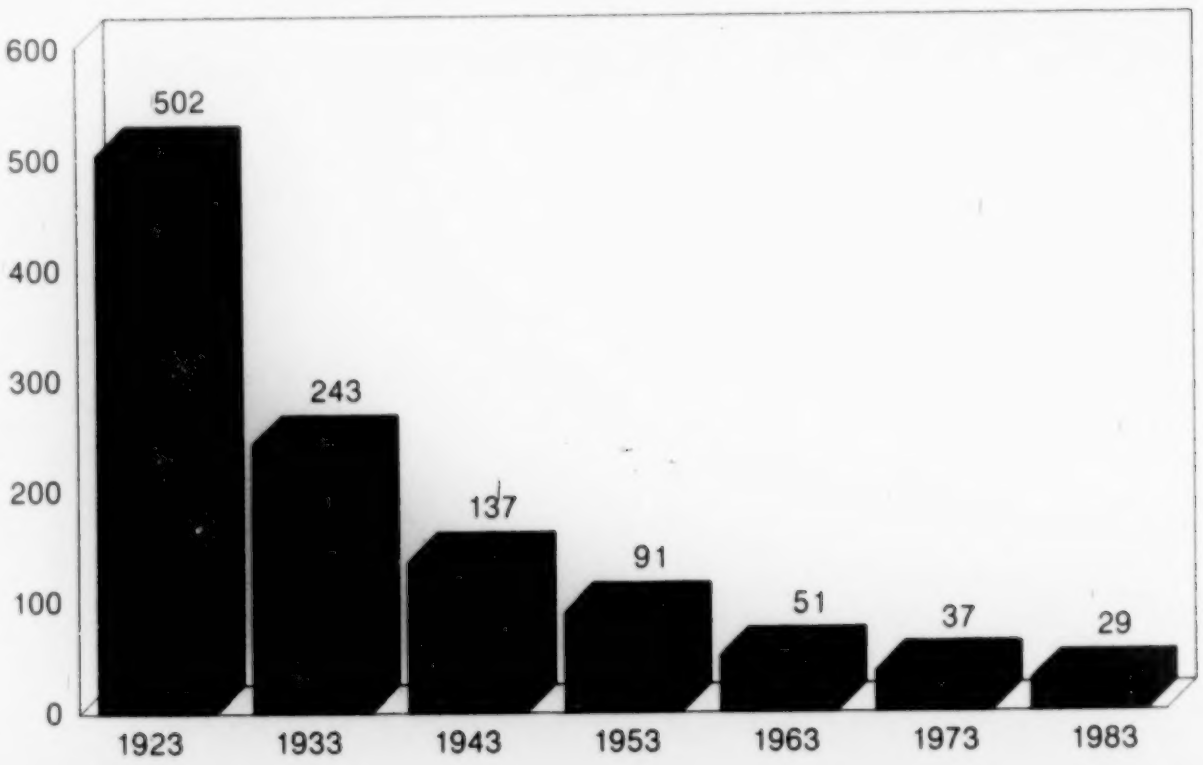
CITIES IN THE 30 LARGEST U.S. MARKETS HAVING TWO OR MORE COMMERCIALLY COMPETITIVE NEWSPAPERS



***The second newspaper in seven of these nine markets operated at a loss.**

Source: JA 537-40

TOTAL U.S. CITIES HAVING TWO OR MORE COMMERCIALLY COMPETITIVE NEWSPAPERS



Source: JA 590